

In The

JUL 1 1976

Supreme Court of the United States

October Term, 1975

No. 75-1880

THE TITLE GUARANTEE COMPANY, a Subsidiary of
PIONEER NATIONAL TITLE INSURANCE COMPANY, a
Subsidiary of TITLE INSURANCE AND TRUST
COMPANY, a Subsidiary of THE TI CORPORATION (OF
CALIFORNIA),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF
BARNES AND NOBLE BOOKSTORES, INC., AS AMICUS
CURIAE**

**ROBERT M. SALTZSTEIN
JEFFREY L. KREISBERG
MIRKIN, BARRE, SALTZSTEIN
& GORDON, P.C.
98 Cutter Mill Road
Great Neck, New York 11021
(516) 466-6030**

TABLE OF CONTENTS

	<i>Page</i>
Introduction	2
Interests of the <i>Amicus Curiae</i>	2
Summary of Reasons for Granting the Writ	3
Reasons for Granting the Writ:	
I. The Issue and Effects of the Decision of the Court of Appeals	3
II. The 1974 Amendments to the FOIA Were Not Intended to Apply Only to Closed Cases	4
III. The Question of Whether Exemptions 5, 7(C) or 7(D) Require Nondisclosure of Board Investigatory Affidavits in Open Unfair Labor Practice Cases ..	6
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Barnes and Noble Bookstores, Inc. v. National Labor Relations Board, S.D.N.Y., No. 76 Civ. 1168	2
Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir. 1974)	5
Goodfriend Western Corp. v. Fuchs, ___F.2d ___, 92 LRRM 2466 (1st Cir. 1976)	4
Frankel v. S.E.C., 460 F.2d 813 (2d Cir.), cert. denied, 409 U.S. 889 (1972)	4

Contents

Page

Title Guarantee v. NLRB, ___F.2d ___, 91 LRRM 2993	2, 4, 5
--	---------

Statutes Cited:

Freedom of Information Act, 5 U.S.C. §552	2
(b)(7)(A)	3, 6
(b)(7)(C)	3, 6
(b)(7)(D)	3, 6
(b)(5)	3, 6
National Labor Relations Act, 29 U.S.C. §151	3

Rule Cited:

Rule 42(2)	2
------------------	---

APPENDIX

Appendix A—Order of the District Court, United States District Court for the Southern District of New York .	1a
Appendix B—Order of the Court of Appeals, United States Court of Appeals for the Second Circuit	6a

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INTRODUCTION

This brief is on behalf of Barnes and Noble Bookstores, Inc., as *amicus curiae* filed pursuant to written consent of the parties under Rule 42(2) of this Court. It is in support of the petitioner, The Title Guarantee Company, a Subsidiary of Pioneer National Title Insurance Company, a Subsidiary of Title Insurance and Trust Company, a Subsidiary of The Ti Corporation (of California).

INTERESTS OF THE *AMICUS CURIAE*

Barnes and Noble Bookstores, Inc. is the respondent in an unfair labor practice proceeding now pending before the National Labor Relations Board (Case No. 2-CA-13940).

Barnes and Noble Bookstores, Inc. is also the plaintiff in *Barnes and Noble Bookstores, Inc. v. National Labor Relations Board* now pending before the United States District Court for the Southern District of New York (Civil Action No. 76 Civ. 1168). That lawsuit, like the instant case, involves a claim under the Freedom of Information Act, 5 U.S.C. §552, (hereinafter "the FOIA" or "the Act") for production of investigatory affidavits obtained by the National Labor Relations Board (hereinafter "the NLRB" or "the Board").¹ The decision by the Court in this case will undoubtedly affect the outcome of that action.

1. On March 12, 1976, the District Court issued a mandatory injunction requiring the Board to turn over to Barnes and Noble certain affidavits it had obtained during the unfair labor practice charge investigation. The court directed, as part of its order, that the names of the affiants be redacted; that the affidavits be furnished for the confidential use of counsel only; that no copies of the affidavits be made; and that the affidavits be returned to the Board following such use. The order of the District Court is annexed hereto as Appendix A. On April 12, 1976 the Board filed a notice of appeal from this order and moved in the Court of Appeals for summary reversal. On April 22, 1976, the Court of Appeals denied without prejudice the motion for summary reversal and remanded the case to the District Court for further consideration in light of its decision in *Title Guarantee*, 91 LRRM 2993. The order of the Court of Appeals is annexed hereto as Appendix B. On May 25, 1976, the Board filed a motion to vacate the order of the District Court and to dismiss the complaint. That motion is now pending before the District Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Circuit Court below erroneously concluded that a blanket exemption exists under Exemption 7A of the FOIA, 5 U.S.C. §552(b)(7)(A) requiring nondisclosure of investigatory affidavits in "open" NLRB unfair labor practice cases. The court declined to decide whether such an exemption also exists under Exemptions 7(C)(D) and 5 of the Act, 5 U.S.C. §552(b)(7)(C)(D) and (5), though the Board claimed each of those sections as a basis for nondisclosure.

The issues presented here are of critical importance to the efficient administration of the National Labor Relations Act, §29 U.S.C. §151 *et seq.* (hereinafter the "NLRA"), an important segment of the labor law of the country. Concerning as it does the case handling of virtually every unfair labor practice proceeding, consideration by the Court is essential.

REASONS FOR GRANTING THE WRIT

I.

The Issue and Effects of the Decision of the Court of Appeals

The issues presented by this case are of importance to all parties appearing before the NLRB. The final decision herein will consider whether, and under what circumstances, a party in an open unfair labor practice proceeding may obtain production of affidavits obtained by the Board during the course of its investigation. The decision will further determine whether an injunction may issue staying Board proceedings pending the NLRB's appeal of an order directing disclosure under the FOIA, and, if so, the appropriate circumstances therefor.

The Court of Appeals has broadly determined that the NLRB may refuse to disclose *any* affidavits obtained in connection with an open unfair labor practice case without any

prior specific showing that such disclosure would result in the harm set forth in Exemption 7(A). In view of the likelihood that unless reversed by this Court, the decision in *Title Guarantee* will be followed by other circuits, (see *Goodfriend Western Corp. v. Fuchs*, 92 LRRM 2466) the effect of this decision will be to create a blanket exemption under the FOIA for affidavits obtained in NLRB unfair labor practice proceedings. Such a result would be contrary to the intent of the statute.

II.

The 1974 Amendments to the FOIA Were Not Intended to Apply Only to Closed Cases

The Court of Appeals has construed the 1974 Amendment enacting Exemption 7A as intending only to revise the prior law with respect to "closed" investigative files while leaving the law with respect to "open" cases unchanged. *Title Guarantee*, 91 LRRM 2993, 2997-2998. In so holding, the court relied on the fact that Senator Hart's amendment was suggested by the Administrative Law Section of the American Bar Association. That report was based in turn upon the report of the Committee on Federal Legislation of the Association of the Bar of the City of New York, which had criticized *Frankel v. SEC*, 460 F.2d 813 (2nd Cir.), *cert. denied*, 409 U.S. 889 (1972), a case involving a closed investigation file. This rationale has been specifically followed by the First Circuit in *Goodfriend Western Corp. v. Fuchs*, 92 LRRM 2466, and, unless reversed by this Court will likely be followed in other circuits. The net result of this approach will be to severely limit the scope of the 1974 Amendments. These Amendments may not be so narrowly construed.

In considering the form of the 1974 Amendments, Congress seriously considered two versions. One was the Attorney General's proposal and the other the proposal of the Bar of the City of New York. The only difference between these two

versions was that the Attorney General's would have specifically exempted open files from disclosure while the New York Bar version contained no such limitation. As noted by the Court of Appeals, it was this latter proposal which was adopted by Congress. *Title Guarantee*, *id.* Moreover, it should be noted that one of the cases specifically overruled by the 1974 Amendment, *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), cited by the court in footnote 8 of its decision, involved a refusal to disclose information with respect to a *pending investigation*. (Emphasis added.)

In establishing this blanket exemption for investigatory affidavits, the court specifically adopted two arguments of the Board:

First, that suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied;

Second, employees who are interviewed may be reluctant, for fear of incurring employer disclosure, to have it known that they have given information, or union officials might not want to volunteer information for fear of compromising the union's position in negotiations.

Such assumptions by the court are not sanctioned by the Act. The court may not utilize such rationale to circumvent the specific requirements of the Act that the agency must establish its right to the exemption by demonstrating to the district court that production *would* interfere with the Board's enforcement proceeding. This section must be read to require that the requisite showing be made with respect to the enforcement proceeding in each particular case, and not enforcement proceedings generally.

III.

**The Question of Whether Exemptions 5, 7(C) or 7(D)
Require Nondisclosure of Board Investigatory Affidavits in
Open Unfair Labor Practice Cases**

The question of whether Exemptions 5, 7(C) or 7(D) of the Act require nondisclosure was expressly left undecided by the Court of Appeals since it sustained the Board's position on Exemption 7(A). It is important for the efficient administration of the NLRA that the Court decide whether these provisions are applicable, as such claims are consistently raised by the Board in all FOIA cases.

CONCLUSION

Important questions concerning the proper interpretation of the Freedom of Information Act and the proper administration of the National Labor Relations Act are presented by this case. The questions affect all litigants appearing before the National Labor Relations Board and the Board itself. Accordingly, the Court is respectfully urged to grant the petition.

Respectfully submitted,

s/ Robert M. Saltzstein
s/ Jeffrey L. Kreisberg

MIRKIN, BARRE,
SALTZSTEIN &
GORDON, P.C.

**APPENDIX A — ORDER OF THE DISTRICT COURT,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

MP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
BARNES & NOBLE BOOKSTORES, INC.,

Plaintiff,

vs.

NATIONAL LABOR RELATIONS BOARD,

Defendant.

76 Civil 1168

New York, N.Y.

March 12, 1976 - 10:30 a.m.

Before

HON. MILTON POLLACK,

District Judge.

APPEARANCES:

MIRKIN, BARRE, SALTZSTEIN & GORDON, P.C.
Attorneys for Plaintiff
CLIFFORD S. BART, Esq., and
ROBERT M. SALTZSTEIN, Esq., of Counsel

*Appendix A — Order of the District Court, United States District
Court for the Southern District of New York*

JOHN S. IRVING, Esq.,

General Counsel

EDWARD BENNETT, Esq.,

Regional Attorney

Attorneys for Defendant

RAYMOND P. GREEN, Esq., and

ALEXANDER ROSENBERG, Esq., of Counsel

EISNER, LEVY & STEEL, P.C.,

Attorneys for Charging Party

EUGENE G. EISNER, Esq., of Counsel

- - -

[2]THE COURT: The defendant is hereby directed forthwith to make disclosure of the statements of the witnesses whom they are to call at the prospective hearing, redacting therefrom the names and the addresses of the persons whose affidavits are so turned over.

The affidavits in question are those which would be required, and to the extent only that they will be required, to be turned over to the plaintiff after the witness has testified in the hearing upon the complaint under Section 10(c) of the Act.

In the event that this order is not obeyed, this Court directs a stay of the hearing now set until compliance herewith.

The purpose is to afford within the spirit of the law a fair and impartial opportunity to the respondent in the Labor Board case to adequately prepare for trial and for cross-examination of the witnesses involved.

The scope of this requirement is specifically limited to the statements of those whom the NLRB has informed the Court will be produced as witnesses at the hearing involved.

*Appendix A — Order of the District Court, United States District
Court for the Southern District of New York*

In making this ruling, the Court is mindful of the amendment to the Freedom of Information Act effective on or about November 21, 1974, which deleted former Section 7 and [3] substituted as Section 7 the following exemption in respect of the production of investigatory files:

The investigatory records that have been compiled for law enforcement purposes are not hereby required to be produced to the respondent in the proceeding but only to the extent, as stated in the statute, that the production of the affidavits of these prospective witnesses would

(a) Interfere with enforcement proceedings; (No such claim is here made).

(b) Deprive a person of the right to a fair trial and an impartial adjudication; (No such claim is here made).

(c) Constitute an unwarranted invasion of personal privacy; (No such claim is here made).

(d) Disclose the identify of a confidential source; (No such claim is here made. To the contrary, it is intended to disclose the source by placing the affiant on the witness stand in the proceeding).

(e) Disclose investigative techniques and procedures; (This is thoroughly inapplicable, in the circumstances).

(f) Endanger the life or physical safety of law enforcement personnel. (This is inapplicable here.)

This ruling is not intended to derogate from the decided case law that there is no proper right of a respondent in a Labor Board proceeding to require discovery and deposition [4] procedures as normally apply in ordinary civil cases. The sole

Appendix A — Order of the District Court, United States District Court for the Southern District of New York

purpose of this ruling is to regulate the timetable for the production to one which will not be embarrassed by the disclosed inability of the Administrative Law Judge to give sufficient time to allow a continuance to the responding party because of obligations requiring the judicial officer to give only a limited opportunity to the case so that he can go on in another locality to others of the many thousands of cases that the Labor Board is required to hear.

It is no excuse for a Court to say that a respondent shall not have a fair opportunity to know the charges and to prepare himself against the charges to be made by prospective witnesses because the Court is under time pressures. That is not due process.

The motion is disposed of accordingly.

This shall constitute an order.

MR. GREEN: Your Honor, for the record, I would like to make a motion that you stay your order.

THE COURT: That what?

MR. GREEN: For the record, I would like to make a motion that you stay your order.

THE COURT: The motion for a stay of this order is denied. Compliance is directed to be made forthwith.

Is there any reason why physically you cannot [5] comply other than you want to oppose the application?

MR. GREEN: No; there is no physical reason for non-compliance. I would urge the Court to consider in its order that the documents that are to be disclosed be kept by counsel for respondent and not turned over to any other source.

Appendix A — Order of the District Court, United States District Court for the Southern District of New York

THE COURT: I will add to the ordering providing that these documents are furnished for the confidential use of counsel only and in order to enable counsel to understand the charges against his client and to prepare therefor with adequate time in that regard. The documents are to be returned to the Labor Board files upon satisfying the need for their use, and no copies thereof are to be made by the readers of the documents.

That constitutes an amendment to the order.

The foregoing shall constitute the findings of fact and conclusions of the Court, in pursuance of Rule 52(a) of the Federal Rules of Civil Procedure.

Is that clear, Mr. Saltzstein?

MR. SALTZSTEIN: Yes; it is, your Honor.

THE COURT: And Mr. Bart?

MR. BART: Yes, your Honor.

THE COURT: And you are prepared to comply with those requirements?

[6] MR. BARR: Yes, your Honor.

MR. SALTZSTEIN: Yes, your Honor.

THE COURT: All right.

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6a

**APPENDIX B — ORDER OF THE COURT OF APPEALS,
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

No.3 4-27-76

76-8149 C-32

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in
and for the Second Circuit, held at the United States Court
House, in the City of New York, on the twenty-seventh day of
April, one thousand nine hundred and seventy-six.

Barnes and Noble Bookstore, Inc.,

Plaintiff-Appellee,

v.

National Labor Relations Board,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel
for the appellant dated April 12, 1976 to summarily reverse the
order of the United States District Court for the Southern
District of New York be and it hereby is denied without
prejudice to the National Labor Relations Board's position.

It is further ordered that this action be and it hereby is
remanded to the United States District Court for further
consideration in light of this court's recent Title Guarantee
decision and for any other action it sees fit to take.

7a

*Appendix B — Order of the Court of Appeals, United States Court of
Appeals for the Second Circuit*

It is further ordered that this Court shall keep jurisdiction
of the appeal.

A. Daniel Fusaro
Clerk

s/ Edward (illegible)
Senior Deputy Clerk

Before:

HON. J. EDWARD LUMBARD

HON. STERRY R.
WATERMAN

HON. WILFRED FEINBERG
Circuit Judges

Filed U.S. Court of Appeals, April 27, 1976

Filed U.S. District Court May 24, 1976